DAVID CHEAH SENG CHYE v. SO MIAU SONG & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
S NANTHA BALAN JCA
LIM CHONG FONG JCA
[CIVIL APPEAL NOS: P-01(NCvC)(W)-159-03-2019;
P-02(A)-596-03-2019 & P-02(NCvC)(A)-609-04-2019]
3 MARCH 2023

Abstract – *Special circumstances which exclude the application of res judicata or issue estoppel are only attracted upon the plaintiff demonstrating the threshold requirement of illegality, lack of jurisdiction or fraud which had occasioned in the original action. Nonetheless, the plaintiff may still be denied the opportunity to pursue the fresh action if special circumstances dictate that it is unjust for the plaintiff to do so. Put in another way, special circumstances do not create a new category warranting the pursuit of a fresh action but operate to deny the pursuit of the fresh action notwithstanding illegality, lack of jurisdiction or fraud had been made out.*

CIVIL PROCEDURE: *Res judicata – Principle – Special circumstances – Appeals concerning real estate of deceased – Trust – Deceased died testate, leaving will, codicil and deed of indenture – Whether there were special circumstances which excluded application of res judicata or issue estoppel – Whether attracted – Whether illegality, lack of jurisdiction or fraud had occasioned in original action – Whether fresh action ought to be allowed*

There were three related appeals, against the High Court's decision on three related actions concerning the real estate of one deceased Cheah Leng Keah ('testator'), namely (i) Civil Suit No. 21NCVC-4-01/2015 ('Suit 1'); (ii) Originating Summons No. 25-98-09/2014 ('OS 2'); and (iii) Originating Summons No. 24NCVC-667-07/2019 ('OS 3'). The appellant was the great grandson of the testator and a beneficiary of the testator's estate ('estate'). The estate included real estate which comprised four pieces of land in Pulau Pinang ('lands'). The testator died in 1938 testate, leaving a will, a codicil and a deed of indenture. Upon the testator's death, probate was granted to Mercantile Bank (Trustees) Limited as the executor and trustee of the estate ('executor'). Pursuant to the codicil and indenture, the lands as well as a sum of RM15,000 to be utilised to build a pagoda with outhouses were transferred to Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang ('trustees'). The trustees, however, did not build the pagoda. In 1964, the executors

initiated a High Court action to seek directions of the court because the construction costs had escalated exponentially since the making of the codicil. Further, planning permission could not be obtained from the local authority. Hence, it was impossible to build the originally intended pagoda by the testator. In 1968, the High Court declared that the gifts had failed and ordered that the monies under cls. 10 and 11 of the codicil formed part of the residuary estate and be paid to the residuary legatees ('order dated 29 March 1968'). There was no appeal against the order. Subsequently, in 1971, Cheah Wee Liam, who was the grandson of the testator and a beneficiary of the estate, initiated a High Court action for declaratory orders that the lands held on trust created under the indenture be declared to form part of the residuary estate or alternatively, that the trust be declared to have failed and the lands be sold and the proceeds divided between the residuary legatees in the proportion of the will. The High Court dismissed the application but went on to order that the trust to build the pagoda on the lands was a charitable trust ('order dated 2 September 1982'). Nonetheless, since the testator had shown a general charitable intention, the lands which were still available could be applied *cy-pres* even though the trust monies for building the pagoda had been depleted and the pagoda could not be built on the lands. There was no fair order extracted and no appeal was filed against this order as well. By reason that the trustees had passed away, Robert Teng, Yeow Teow Giap, Tan Siew Joo and So Kiau Soo were re-appointed as trustees under the indenture. Additionally, Chin Kuet Lee, who was not a beneficiary but a family friend of several of the beneficiaries of the estate sought to recover the lands that had been allegedly been fraudulently transferred to Tan Siew Joo and Tai Chong. The application was dismissed but the lands were ordered to be transferred to the trustees of the estate. Upon the lapse of the private caveats, the appellant lodged fresh private caveats on the lands. Meanwhile, Yeow Teow Giap and Robert Teng passed away and were replaced with Lee Wally and Tan Chin Herng in the High Court. The High Court also ordered the transfer of the lands to the new trustees besides also authorising the sale of two lots of the lands ('order dated 7 May 2014'). Applying *cy-pres*, the new trustees conceived the plan to build a meditation hall and chalets *in lieu* of a pagoda on only two of the lots of the lands, using funds derived from the sale of two other lots. The appellant commenced Suit 1, praying for, *inter alia*, (i) a declaration that all subsequent actions and/or court proceedings and/or judgments and orders made contrary to the order dated 29 March 1968 be declared null and void; (ii) the execution of the order dated 7 May 2014 be stayed pending the disposal of the action; (iii) the trustees of 'Liam Hood Tong Chor Seng Thuan, Amanah Kebajikan Awam' appointed *vide* any subsequent orders be removed; and (iv) the Registrar of Land Titles be directed to take all necessary actions to give effect to the order of the court. Additionally, Tan Siew Joo, Tai Chong and So Miau Song instituted OS 2 and OS 3 to seek for declarations to cancel and

set aside private caveats lodged by the appellants on the lands as well as prohibition of lodgment of further private caveat on the lands and the Registrar of Land Titles to cancel the same on all title memorials, accordingly. Suit 1 was dismissed while OS 2 and 3 were allowed ('order 27 April 2016'). Hence, the present appeals.

Held (dismissing appeals)
Per Lim Chong Fong JCA delivering the judgment of the court:

(1) The appellant neither pleaded illegality, lack of jurisdiction nor fraud to justify the institution of Suit 1. He also conceded that there was no case authority that public charitable trust and/or private trust were special categories where the doctrine of *res judicata* ought not to apply. The appellant had relied on the earlier decision in order 27 April 2016, refusing to summarily strike out Suit 1 as sought by So Kiau Soo, Tai Chong, Tan Siew Joo, Lee Wally and Tan Chin Herng based on *res judicata*. However, that was an interlocutory decision which was incapable and did not attract *res judicata* that bound the trial judge at the subsequent trial of the action. (paras 52 & 53)

(2) There was no misdirection by the trial judge who held that Suit 1 was barred by *res judicata* by reason of the order dated 2 September 1982. The decision remained valid notwithstanding the fair order was never drawn up by either of the parties. Further, the order dated 29 March 1968 related only to the will and codicil but not the indenture. It did not affect the land and the pagoda as provided in the indenture. Consequently, the decision of the trial judge *ie*, order 2 September 1982, stood unaffected because the court was neither *functus officio* nor acted in excess of jurisdiction at the material time and there was no further appeal against it. (paras 54 & 55)

Case(s) referred to:
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***
Hsu Yik Chai v. Hsu Yaw Tang & Anor [1983] 1 CLJ 19; [1983] CLJ (Rep) 170 FC ***(refd)***
Ikumi Terada v. Jemix Co Ltd & Ors and Another Appeal [2019] 1 LNS 881 CA ***(refd)***
Nai Seng Hiang & Ors v. The Trustees Of The Presbyterian Church In Singapore Registered & Ors [1988] 1 LNS 98 ***(refd)***
Re Syed Abdulrahman Shaikh Abdulrahman Alkaff, Deceased [1953] 1 LNS 88 ***(refd)***
Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***
Sir Han Hoe Lim v. Lim Kim Seng & Anor [1956] 1 LNS 114 ***(refd)***
Smith v. Hallum 286 Ga 834 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 42 r. 10

For the appellant - Ambiga Sreenevasan, Najib Zakaria; Ajmeer Singh Sandhu, Shireen Selvaratnam, Joshua Narendran Sundramutty, Sarah Ho Yixin & Suhaimi Ibrahim; M/s Ajmer Sandhu & Ong
For the respondents - T Gunaseelan, Balwant Singh Purba, Ung Chirt Kye & Ooi Zie Yiong; M/s Phee Chen & Ung
For the Attorney General - Mohammad Al Saifi Hashim & Erma Wani Ahmad Keflee; SFCs & Nur Syazwani Abdul Aziz; FC

[Editor's note: For the High Court judgment, please see David Cheah Seng Chye v. So Miau Song & Ors [2018] 5 CLJ 83 (affirmed).]

Reported by Lina E

JUDGMENT

Lim Chong Fong JCA:

Introduction

[1] There are three related appeals before us in the present case which are as follows:

(i) Civil Appeal No: P-01(NCvC)(W)-159-03-2019 ("Appeal 159");

(ii) Civil Appeal No: P-02(A)-596-03-2019 ("Appeal 596"); and

(iii) Civil Appeal No: P-02(NCvC)(A)-609-04-2019 ("Appeal 609").

(collectively "appeals").

[2] The appeals are against the High Court of Penang's decision on three related actions which concern the real estate of a well-known Penangite and philanthropist, Cheah Leng Keah, the deceased as follows:

(i) Civil Suit No: 21NCVC-4-01-2015 ("Suit 1");

(ii) Originating Summons No: 25-98-09-2014 ("OS 2"); and

(iii) Originating Summons No: 24NCVC-667-07-2019 ("OS 3").

[3] At the conclusion of the hearing of the appeals on 14 November 2022, we adjourned our decision pending further written submissions by the parties on two points of law identified and requested by us. After receipt of the same and due deliberation, we dismissed the appeals on 27 February 2022 with global costs of RM30,000 for the first to fifth respondents represented by Messrs Phee Chen & Ung subject to the allocator, and RM10,000 to the sixth respondent represented by the Attorney General's Chambers.

[4] For purposes herein, we will address the parties by their names for clarity because of the nature of the dispute that involves several parties as well as several actions (but with the parties involved as plaintiff in one action but as defendant in the other two actions and *vice versa*).

Background

[5] David Cheah Seng Chye is the great grandson of the late Cheah Leong Keah, the deceased ("testator") and is a beneficiary of the testator's estate ("estate"), He also represents the other beneficiaries of the estate.

[6] The testator died on 25 March 1941 testate leaving a will dated 26 November 1938 ("will"), a codicil dated 6 March 1941 ("codicil") and a deed of indenture dated 6 March 1941 ("indenture").

[7] The transcribed codicil is reproduced below:

> I, Cheah Leong Keah of 65 Kelawei Road Penang declare this to be the first codicil to my Will which bears date the 26th day of November 1938.
>
> 1. I give to my trustees the sum of Dollars Three hundred ($300/-) upon the following trusts:
>
> (a) Upon trust to divide the said sum of Dollars Three hundred ($300/-) into as many equal share as there are children of Goh Soon Chang of No. 36 Macalium Street Penang (by any wife of his) living ten years after the date of my death) and to pay one or such shares to each such child who shall be ... expiration of the ten years from the date of my death apply to my trustees for payment of his or her share.
>
> (b) I direct that if there shall be no children of the said Goh Soon Chang living at the expiration of the ten years from my death then the said sum of Dollars Three hundred ($300/-) shall revert to and form part of my residuary moveable estate.
>
> (c) I direct that the share of any such child who shall not apply for payment to my trustees before the expiration of the ten years from the date of my death shall revert to and form part of my residuary moveable estate.
>
> (d) I declare that the said bequest shall not carry interest.
>
> 2. I give to my trustees the sum of Dollars two hundred ($200/-) upon the following trusts:
>
> (a) Upon trust to pay the said sum of Dollars two hundred ($200/-) to Cheah Kee Be of 97 Tanjong Tokong Road Penang if he shall survive me and provided that he shall before the expiration of ten years from the date of my death apply to my trustees for payment of the said sum of Dollars two hundred ($200/-).
>
> (b) Upon trust if the said Cheah Kea Bee shall predecease me or die before the expiration often years from the date of my death without having received payment of the said sum of Dollars two hundred

($200/-) and leaving his lawful widow Lee Keong Oon (having been his first wife) him surviving to pay the said sum of Dollars two hundred ($200/-) to the said Lee Keong Oon if she shall survive me and provided that she shall before the expiration of ten years from the date of my death apply to my trustees for payment of the said sum of Dollars two hundred ($200/-).

(c) Upon trust to the said Cheah Kee Ee and the said Lee Keong Oon shall predecease me or die before the expiration of ten years from the date of my death without either of them having received payment of the said sum of Dollars two hundred ($200/-) to divide the said sum of Dollars two hundred ($200/-) into as many equal shares as there are children of the said Cheah Kee Ee (by any wife of his) living ten years after the date of my death and to pay one of such shares to each such child who shall before the expiration of ten years from the date of my death apply to my trustees for payment of his or her shares.

(d) I direct that if the said Cheah Kee Ee and the said Lee Keong Oon and children shall predecease me or if there should be no children of the said Cheah Kee Ee living at the expiration of ten years from the date of my death or if the said Cheah Kee Ee the said Lee Keong Oon or children as the case may be shall not apply to my trustees before the expiration of ten years from the date of my death for payment of the said sum of Dollars two hundred ($200/-) then the sum of Dollars two hundred ($200/-) shall revert to and form part of my residuary moveable estate.

(e) I direct that the share of any such child shall not apply for payment to my trustees before the expiration of ten years from the date of my death shall revert to and form part of my residuary moveable estate.

(f) I declare that the said bequest shall not carry interest.

3. I give to my trustees the sum of Dollars Two thousand two hundred ($2,200/-) upon the following trusts:

(a) Upon trust to pay the said sum of Dollars Two thousand and two hundred ($2,200/-) to the proprietor as at the 1st day of January 1941 of the firm P.K.A.C.T Chettiar if he shall survive me and provided that he shall before the expiration of ten years from the date of my death apply to my trustees for payment of the said sum of Dollars Two thousand two hundred ($2,200/-)

(b) Upon trust if the said proprietor of the firm P.K.A.C.T Chettiar shall predecease me or die before the expiration of ten years from the date of my death without having received payment of the said sum of Dollars Two thousand two hundred ($2,200/-) and leaving his lawful widow (having been his first wife) him surviving to pay the said sum of Dollars Two thousand two hundred ($2,200/-) to such lawful widow of the said proprietor of the firm P.K.A.C.T Chettiar if she shall survive me and provided that she shall before the

expiration of ten years from the date of my death apply to my trustees for payment of the said sum of Dollars Two thousand and two hundred ($2,200/-). A

(c) Upon trust if the said proprietor of the firm P.K.A.C.T Chettiar and such lawful wife shall predecease me or die before the expiration of ten years from the date of my death without either of them having received payment of the said sum of Dollars Two thousand two hundred ($2,200/-) to divide the said sum of Dollars Two thousand and two hundred ($2,200/-) into as many equal shares as there are children of the said proprietor of the firm P.K.A.C.T Chettiar (by any wife of his) living ten years after the date of my death and to pay one of such shares, to each such child who shall before the expiration of ten years from the date of my death apply to my trustees for payment of his or her share. B C

(d) I direct that if the said proprietor of the firm of P.K.A.C.T Chettiar and such, lawful wife and children, shall predecease me or if there shall be no children of the said proprietor, of the firm of P.K.A.C.T Chettiar living at the expiration of ten years from the date of my death or if the said proprietor of the firm of P.K.A.C.T Chettiar such lawful widow or children as the case may be shall not apply to my trustees before the expiration of ten years from the date of my death for payment of the said sum of Dollars Two thousand two hundred ($2,200/-) then the said sum of Dollars Two thousand two hundred ($2,200/) shall revert to and form part of my residuary moveable estate. D E

(e) I direct that the share of any such child who shall not apply to my trustees before the expiration of ten years from the date of my death shall revert to and form part of my residuary moveable estate. F

(f) I direct that my trustees may accept a statutory declaration by a Justice of the Peace or other responsible person as proof of the identity of the lawful widow (having been his first wife) of the said proprietor of the firm of P.K.A.C.T Chettiar.

(g) I declare that the said bequest shall not carry interest. G

4. I give my trustees the sum of Dollars three hundred ($300/-) upon the following trusts:

(a) Upon trust to pay the said sum of Dollars three hundred ($300/-) to the lawful widow (having been his first wife) of V.R.R.M Ramanathan Chettiar son of Verappa Chettiar if she shall survive me and provided that she shall before the expiration of ten years from the date of my death apply to my trustees for payment of the said sum of Dollars three hundred ($300/-). H

(b) Upon trust if the said lawful widow of V.R.R.M Ramanathan Chettiar shall predecease me or die before the expiration of ten years from the date of my death without having received payment of the said sum of Dollars three hundred ($300/-) to divide the said I

A sum of Dollars three hundred ($300/-) into as many equal shares as there are children of the said V.R.R.M Ramanathan Chettiar living ten years after the date of my death and to pay one of such shares to each such child who shall before the expiration of ten years from the date of my death apply to my trustees for payment of his or her share.

B

(c) I direct that if such lawful widow and children of V.R.R.M Ramanathan Chettiar shall predecease me or if there shall be no children of the said V.R.R.M Ramanathan Chettiar living the expiration of ten years after the date of my death or if the said lawful widow or children of the said V.R.R.M Ramanathan Chettiar as the case may be shall not apply to my trustees before the expiration of ten years from the date of my death for payment of the said sum of Dollars three hundred ($300/-) then the said sum of Dollars three hundred ($300/-) shall revert to and form part of my residuary moveable estate.

C

D (d) I direct that the share of any such child who shall not apply for payment to my trustees before the expiration of ten years from the date of my death shall revert to and form part of my residuary moveable estate.

(e) I direct that my trustees may accept a statuary declaration by Justice of the Peace and other responsible person as proof of the identity of the lawful widow (having been his first wife) of the said V.R.R.M Ramanathan Chettiar.

E

(f) I declare the said bequest shall not carry interest.

5. I give to my trustees the sum of Dollars Seven thousand ($7,000/-) upon the following trusts:

F

(a) Upon trust to pay the said sum of Dollars Seven thousand ($7,000/-) to the lawful widow (having been his first wife) of S.L.J Chettiappa Chettiar son of Latobumannan Chettier if she shall survive me and provided that she shall before the expiration of ten years from the date of my death apply to my trustees for payment of the said sum of Dollars Seven thousand ($7,000/-).

G

(b) Upon trust if the said lawful widow of S.L.S Chettiappa Chettiar shall predecease me or die before the expiration of ten years from the date of my death without having received payment of the said sum of Dollars Seven thousand ($7,000/-) to divide the sum of Dollars Seven thousand ($7,000/-) into as many equal shares as there are children of the said S.L.S Chettiappa Chettiar living ten years after the date of my death and to pay one of such shares to each such child who shall before the expiration of ten years from the date of my death apply to my trustees for payment of his or her share.

H

I

(c) I direct that if such lawful widow and children of S.L.S Chettiappa Chettiar shall predecease me or if there shall be no children of the said S.L.S Chettiappa Chettiar living at the expiration of ten years

after the date of my death or if the said lawful widow or children of the said S.L.S Chettiappa Chettiar as the case may be shall not apply to my trustees before the expiration of ten years from the date of my death for payment of the said sum of Dollars Seven thousand ($7,000/-) then the said sum of Dollars Seven thousand ($7,000/-) shall revert to and form part of my residuary moveable estate.

(d) I direct that the share of any such child who shall not apply to may trustees before the expiration of ten years from the date of my death shall revert to and form part of my residuary moveable estate.

(e) I direct that my trustees may accept a statuary declaration by a Justice of the Peace or other responsible person as proof of the identity of the lawful widow (having been his first wife) of the said S.L.S Chettiappa Chettiar.

(f) I declare that the said bequest shall not carry interest.

6. I bequest the following further annuities free of all to commence from the date of my death:

(a) To Wah Tee a Buddhist monk of 7 Rifle Range Road Penang an annuity of Dollars three hundred and sixty ($360/-) for ten years after my death or until his death whichever period is shorter to be paid by equal monthly payments the first whereof shall be made one month after my death.

(b) To Low King Yong of Poh Oo Toong Temple 255F Burmah Road Penang an annuity of Dollars One hundred and twenty ($120/-) for ten years after my death or until her death whichever period is shorter to be paid by equal monthly payments the first whereof shall be made one month after my death.

(c) To Teng Thong Tak of 375 Caunter Hall Penang an annuity of Dollars sixty ($60/-) for ten tears after my death or until her death whichever period is shorter to be paid by equal monthly payments the first whereof shall be made one month after my death.

(d) (1) to H'ng Tong of 127 Chulia Street Penang a messenger to the Teochew Association an annuity of Dollars sixty ($60/-) for ten years after my death or until his death whichever period is shorter to be paid by equal monthly payments the first whereof shall be made one month after my death to be applied by him for the payment of contribution to the Teochew Association Provident Fund for and on behalf of such members who have joined the said Fund and who are unable through poverty to continue their contribution to the said Fund as the said H'ng Tong in his uncontrolled discretion shall think fit.

(2) I declare that my trustees shall not be bound to see to the application of this annuity.

(e) (1) To Lee Soon Keng of 163 Dato Kramat Road Penang who is now the vice-president of the Penang Buddhist Association an annuity of Dollars sixty ($60/-) for ten years after my death or until

his death whichever period is shorter to be paid by equal monthly payments the first whereof shall be made one month after my death to be applied by him for the payment of contributions to one Penang Buddhist Association Provident Fund for and on behalf of the such members who have joined the said Fund and who are unable through poverty to continue their contributions to the said Fund as the said Lee Soon Keng in his uncontrolled discretion shall think fit.

(2) I declare that my trustees shall not be bound to see to the application of this annuity.

(f) (1) To Tan Poh Phek of Por Tee Huck Ee Temple 1A Bagan formal Road Penang an annuity of Dollars One hundred and twenty ($120/-) for ten years after my death or until her death whichever period is shorter to be paid by equal monthly payments the first whereof shall be made one month after my death to be applied by her as to the sum of Dollars seven ($7/-) monthly for the upkeep of the said Por Tee Huck Ee Temple and as to the remaining sum of Dollars Three ($3/-) monthly for the payment contribution to the Provident Fund, of the said Por Tee Huck Be Temple for and on behalf of such members who have joined the said. Fund and who are unable through poverty to continue their contributions to the said Fund as the said Tan Poh Pek in her uncontrolled discretion shall think fit.

(2) I declare that my trustees shall not be bound to see to the application of this annuity.

7. If any of my annuitants named in clause 6 hereof shall commit permit or suffer any act default or process whereby the annuity payable to him or her or any part thereof would but for a present provision become vested in or payable to any other person or persons or a corporation then such annuity shall immediately thereupon absolutely cease and determine as if the said annuitant were dead and I declare that no annuitant named in clause 6 hereof shall be entitled to receive the capital value of his or her annuity *in lieu*, thereof.

8. I direct that my trustees shall permit my younger sister Cheeh Soo Heoh and her children to occupy my house No. 3170 Kein Road Penang from the date when the said house becomes vacant until her death or until the date of distribution of my moveable estate accordingly to clause 21 of my will whichever event shall happen first free of rent and of all costs of repairs insurance premiums and quit rents the said Cheeh Soo Heoh to pay municipal rates and assessments and all charges for water electricity supplied in respect of the said house.

9. (a) Whereas my clause 21(c) of my said Will I directed that my trustees should permit my wife Teng Boh Tuan Nooh and all my children by her and by my deceased wife Heng Ooi Neoh and their wives and children to have the use and enjoyment of my lands and houses known as No. 65 Kelawei Road and Nos. 4 and 6 Bangkok Lane Penang during the life of my said wife Teng Boh Tuan Nooh as therein mentioned. Now

I hereby declare that my grandsons Cheah Wee Liam, Cheah Wee Soon and Cheah Wee Hock who are sons of my deceased son Cheah Phin Cheng shall be excluded from and houses No. 65 Kelawei Road and Nos. 4 and 6 Bangkok Lane Penang.

9. (b) I direct my trustees to permit such one or more of them the said Cheeh Wee Liam, Cheah Wee Soon and Cheeh Wee Hock as shall at my death be unmarried to occupy my houses No. 19 Bangkok Lane Penang free of rent and of all assessments rates taxes and quit rents in respect thereof and of all cost of repairs and insurance premiums so long as he or they or any of them shall remain unmarried or until the date of distribution of my immoveable estate according to clause 21 of my will whichever event shall happen first.

10. (a) I bequeath the sum of Dollars Fifteen thousand ($15,000/-) to my sons Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang to be applied by the said Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang in building a pagoda and outhouses in accordance with the terms of a deed of even date herewith but executed before these presents and made between myself of the one part and the said Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang of the other part (hereinafter called "the said deed").

10. (b) I direct that:

(1) the said sum of Dollars Fifteen thousand ($15,000/-) shall be paid at any time when sufficient funds are available in my residuary moveable estate but in any event not later than twenty one years from the date of my death.

(2) the said bequest shall not carry interest.

(3) my trustees shall not be bound to see to the application of the said sum of Dollars Fifteen thousand ($13,000/-) and the receipt of the said Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang or the trustees of the said deed for the time being shall be a sufficient and valid discharge to my trustees.

11. (a) I bequeath the sum of Dollars Five thousand ($5,000/-) to my sons Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang to be applied by the said Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang in accordance with the terms of the said deed.

11. (b) I direct that:

(1) the said sum of Dollars Five thousand ($5,000/-) shall be paid after the said pagoda and outhouses have been built in accordance with the said deed.

(2) the said bequest shall not carry interest.

(3) my trustee shall not be bound to see to the application of the said sum of Dollars Five thousand ($5,000/-) and the receipt of the said Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang or the trustees of the said deed for the time being shall be a sufficient and valid discharge to my trustees.

A In all other respects I confirm my said Will.

In witness whereof I have hereunto act my hand this fifth day of March One thousand nine hundred and forty one.

B	Signed by the said Cheah Leong Keah the codicil to his will which bears into the 26th day of November 1938 the presence of us present at the time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses	(Signed) Cheah Leong Keah

C **[8]** The transcribed indenture is also reproduced below:

This INDENTURE is made the sixth day of March One thousand nine hundred and forty one Between Cheah Leong Keah of 65 Kelawei Road Penang (hereinafter called "the Donor") of the one part and Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang all of 65, Kelawei Pulau
D Penang aforesaid of the other part of the trust.

Whereas the Donor is seised in fee simple in possession free from encumbrances of the lands and hereditaments described in the schedule hereto and he is desirous of settling the same for the purposes of erection of a pagoda thereon and otherwise in manner hereinafter appearing.

E Now This Indenture Witnesseth as follows:

The Donor does hereby freely and voluntarily and without any valuable consideration grant and convey to the said Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang all the lands and hereditaments described in the schedule hereto to hold the same unto the said Cheah Phin Kee,
F Cheah Phin Yeong and Cheah Phin Cheang in fee simple upon Trust that they and the survivors or the survivor of them or other the trustees or trustee for the time being of these present (all of whom are hereinafter included in the expression the trustees) shall hold the same upon the following trusts:

G (a) Upon trust herewith to expend the sum of Dollars Fifteen Thousand ($15,000.00) when received from the trustees of the will of the donor in erecting and building upon the said lands and hereditaments or upon some part thereof a pagoda to be called "Liam Hood Tong Chor Seng Thuan" with outhouses;

H (b) Upon trust to allow all persons who profess the Buddhist religion to worship and perform religious ceremonies in conformity with the Buddhist religion in the said pagoda;

(c) Upon trust to allow the said outhouses to be used and occupied in connection with the said pagoda and inconformity with the Buddhist religion by such persons and in such manner as the
I trustees shall direct; and

(d) Upon trust to invest the sum of Dollars Five Thousand ($5,000.00) when received from the trustee of the will of the Donor in any investment authorised by the law of the Straits Settlements for the investment of trust funds and to use the income thereof in altering, adding and to repairing insuring against the fire of other risks or rebuilding the said pagoda and outhouses in such manner as the trustees shall think fit or for such other purpose as in the opinion of the trustees the state of the trust property or the requirements of the said pagoda or outhouses may from time to time render expedient.

2. The trustees may at their discretion at any time or times appoint another person or other persons to be an additional trustee or additional trustees provided always that the number of the trustees of these presents shall not be increased beyond nine by virtue of any such appointment as aforesaid.

In Witnesseth Hereof the said Cheah Leong Keah, Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang have hereunto set their respective lands and seals the day and year first above written.

The Schedule above referred to:

All Those three pieces of lands and hereditaments situate in the North East District of Penang comprised in Grant No. 694 which said three pieces of land form Lots 16(2), 16(5) and 16(5) Town Subdivision 1 respectively and contain the respective areas of 4 acres rood and 3 poles 1 acre 3 roods and 28.8 poles and 1 acre 0 rood and 35.1 poles or thereabout.

Signed Sealed and Delivered by the abovenamed Cheah Leong Keah in the presence of:) Signed C Leong Keah

J.B.M Wilson
Solicitor Penang

Signed Sealed and Delivered by the abovenamed Cheah Phin Kee in the presence of:) Signed Cheah Phin Kee

J.B.M Wilson

Signed Sealed and Delivered by the Abovenamed Cheah Phin Yeong in the presence of:) Signed Cheah Phin Yeong

J.B.M Wilson

Signed Sealed and Delivered by the Abovenamed Cheah Phin Cheang in the presence of:) Signed Cheah Phin Cheang

J.B.M Wilson

A On this 6th day of March 1941, before me John Bernard Maxwell Wilson an Advocate and solicitor of the Supreme Court of the Straits Settlements practicing in the Straits Settlements personally appeared Cheah Leong Keah, Cheah Phin Kee, Cheah Phin Yeong, and Cheah Phin Cheang who of my own personal knowledge I know to be the identical persons whose respective names "C. Leong Keah", "Cheah Phin Kee", "Cheah Phin
B Cheang" are subscribed to the within written instrument and acknowledged that they had voluntarily executed this instrument at No. 65, Kelawei Road, Penang.

Witness my hand
J.B.Wilson
C Solicitor, Penang

[9] The estate included real estate which comprises:

(i) all that piece of land known as Lot No 491, Seksyen 1, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang comprised in Geran No
D 20348 ("Lot 491")

(ii) all that piece of land known as Lot No 492, Seksyen 1, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang comprised in Geran No 20348 ("Lot 492").

(iii) all that piece of land known as Lot No 292, Seksyen 1, Bandar
E Georgetown, Daerah Timur Laut, Pulau Pinang comprised in Geran No 5935 ("Lot 292").

(iv) all that piece of land known as Lot No 960, Seksyen 1, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang comprised in Geran No
F 20273 ("Lot 960").

(collectively "lands").

[10] The lands are the subject matter of the actions in High Court of Penang.

G **[11]** Upon the testator's death, probate was granted to Mercantile Bank (Trustees) Limited as executor and trustee of the estate ("executor").

[12] Pursuant to the codicil and indenture, the lands as well as a sum of RM15,000 to be utilised to build a pagoda with outhouses to be named "Liam Hood Tong Chor Seng Thuan" ("pagoda") were transferred to Cheah
H Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang ("trustees").

[13] The trustees however did not build the pagoda as envisaged by the codicil and indenture.

[14] On 17 January 1964, the executors initiated High Court of Penang
I Originating Summons No. 465 of 1963 to seek directions of the court because the construction costs had escalated exponentially since the making

of the codicil. Further, planning permission could not be obtained from the local authority; hence it was impossible to build the originally intended pagoda by the testator.

[15] Consequently, on 29 March 1968, Justice Ong Hock Sim ("Justice HS Ong") declared that the gifts had failed and ordered that the monies under cls. 10 and 11 of the codicil formed part of the residuary estate and be paid to the residuary legatees. There was no appeal against the order made by Justice HS Ong.

[16] Subsequently on 18 December 1971, Cheah Wee Liam who is the grandson of the testator and a beneficiary of the estate initiated High Court of Penang Originating Summons No 387 of 1971 for declaratory orders that the lands held on trust created under the indenture be declared to form part of the residuary estate or alternatively that the trust be declared to have failed and the lands be sold and the proceeds divided between the residuary legatees in the proportion of the will.

[17] On 2 September 1982, Justice Mustapha Hussain in his grounds of judgment dated 20 August 1982 dismissed the application for the declaratory orders but went on to order that the trust to build the pagoda on the lands under cls. 10 and 11 of the codicil and cl. 1 of the indenture is a charitable trust. Nonetheless since the testator has shown a general charitable intention, the lands which are still available can be applied *cy-pres* even though the trust monies for building the pagoda has been depleted and the pagoda cannot be built on the lands. There was however no fair order extracted and there was also no appeal against the order as well.

[18] In the meanwhile, one of the trustees, Cheah Phin Kee died on 22 July 1980. Consequently, and upon the consented application of the Attorney-General pursuant to the Government Proceedings Act 1956, Justice FC Arulanandom on 9 January 1981 ordered that Robert Teng Lye Hock be the replacement trustee pursuant to High Court of Penang Originating Summons No 551 of 1980.

[19] By reason that the other trustees have passed away, the Attorney-General gave his consent to re-appoint trustees. Justice Tee Ah Sing hence on 12 September 2001 appointed Yeow Teow Giap, Tan Siew Joo and So Kiau Soo as new trustees under the indenture pursuant to High Court of Penang Originating Summons No 24-145-1998.

[20] Subsequently, on 14 June 2005, Cheah Wee Liam lodged private caveats on the lands.

[21] Additionally, Chin Kuet Lee who is not a beneficiary but a family friend of several of the beneficiaries of the estate sought to recover the lands that had allegedly been fraudulently transferred to Tan Siew Joo and Tai Chong. Upon the intervention of the Attorney-General, Justice Ghazali bin

A Hj Cha on 16 January 2008 dismissed the application but ordered that the lands be transferred to the trustees of the estate pursuant to High Court of Penang Originating Summons No 24-1487-2005.

[22] Upon the lapse of the aforementioned private caveats, David Cheah Seng Chye on 14 June 2011 lodged fresh private caveats on the lands.

B

[23] In the meanwhile two trustees, to wit, Yeow Teow Giap and Robert Teng Lye Hock died on 18 March 2006 and 27 November 2011 respectively. Hence by a consented application of the Attorney-General, Justice Wong Teck Meng on 7 May 2014 appointed Lee Wally and Tan Chin Herng as new trustees under the indenture and ordered the transfer of the lands to the new C trustees besides also authorising sale of Lots 960 and 292 of the lands by them pursuant to High Court of Penang Originating Summons No. 24NCVC-369-04-2014.

[24] Pursuant to Justice Mustapha Hussain's decision made on 2 September D 1982 applying *cy-pres*, the new trustees conceived the plan to build a meditation hall and chalets *in lieu* of a pagoda on only Lots 491 and 492 of the land using funds derived from the sale of Lots 960 and 292 of the lands.

[25] David Cheah Seng Chye consequently on 8 January 2015 commenced the writ action *vide* Suit 1 in the High Court of Penang, praying as follows:

E

(i) a declaration that all subsequent actions and/or court proceedings and/or judgment and orders made contrary to HS Ong's order dated 29 March 1968 (which comprised the aforementioned orders dated 9 January 1981, 2 September 1982, 12 September 2001, 16 January 2008 and 7 May 2014) be declared null and void;

F

(ii) that the execution of the order dated 7 May 2014 made by Justice Wong Teck Meng be stayed pending the disposal of the present action;

(iii) that the trustees of "Liam Hood Tong Chor Seng Thuan, Amanah Kebajikan Awam" appointed *vide* any subsequent orders be removed;

G

(iv) that the Registrar of Land Titles be directed to take all necessary actions to give effect to the order of this court;

(v) costs; and

(vi) any other orders or further reliefs as this court deems fit.

H

[26] Additionally, Tan Siew Joo, Tai Chong and So Miau Song instituted OS 2 and OS 3 to seek for declarations to cancel and set aside private caveats lodged by David Cheah Seng Chye on the lands as well as prohibition of lodgement of further private caveat on the lands and the Registrar of Land Titles Penang to cancel the same on all title memorials accordingly.

I

In The High Court

[27] In Suit 1, David Cheah Seng Chye contended that the trust whereby the testator appointed his three sons as trustees to build the pagoda named "Liam Hood Tong Chor Seng Thuan" (which in Chinese translation meant ancestral worship hall or altar) aligned with Chinese culture and custom as testified by his expert witness, Dr Tan Ai Boey is a private trust. This is fortified by the testator having clearly observed the rules against perpetuities in respect of the trust for the building of the pagoda and provision of funds to build it.

[28] Furthermore and since the funds required to build the pagoda had been derived from the estate and not by public funds or donation, the trust cannot therefore be a public charitable trust. It is also not a charitable act under Chinese culture and custom for a person to donate funds to his children to build an ancestral worship hall for other unrelated persons.

[29] Additionally, the testator neither used the words "public", "charity", "benefit", "people" or "advancement of Buddhist religion" in the codicil or indenture nor specifically named any alternative charities in the event the trust lapses or fails which would otherwise be cogently indictive that the trust is a public charitable trust.

[30] Finally and since Justice HS Ong had also on 29 March 1968 in High Court of Penang Originating Summons No 465 of 1963 ordered that the gifts of RM15,000 and RM5,000 which are inextricably connected with the lands and pagoda have failed, it is consequently contended that the subsequent High Court of Penang's orders made in relation thereto are void and wrong in law.

[31] In opposition, So Kiau Soo, Tai Chong, Tan Siew Joo, Lee Wally and Tan Chin Herng collectively counter-contended that the indenture plainly evinced a public charitable trust because of the presence of the crucial words "upon trust to allow all persons who profess the Buddhist religion to worship and perform religious ceremonies in conformity with the Buddhist religion in the said pagoda" in the indenture.

[32] They argued that the interpretation of the meaning and intent of the name "Liam Hood Tong Chor Seng Thuan" by the expert witness must be disregarded because she is not a qualified expert meant by the Evidence Act 1950. That notwithstanding, the expert witness could not properly rebut the contradiction of the trust being inconsistent with ancestral worship because the trust expressly permits others not related to the relatives of the deceased but who profess the Buddhist faith to worship in the pagoda. In other words, the testator's true intent tantamount to worship of God.

[33] It is also emphasised that by virtue of Justice Mustapha Hussain's decision made on 2 September 1982 pursuant to High Court of Penang Originating Summons No 387 of 1971, the subject matter and reliefs sought in the suit are barred by *res judicata* and estoppel

[34] The Attorney-General supported So Kiau Soo, Tai Chong, Tan Siew Joo, Lee Wally and Tan Chin Herngs', counter-contentions.

[35] All the parties in Suit 1 seem to have concurred that the outcome of Suit 1 will accordingly determine the outcome of OS 2 and OS 3.

[36] After a trial was conducted in Suit 1, Justice Ahmad Shahrir bin Mohd Salleh found that the general tenor and expressed words used to convey the testator's intent in the indenture is unmistakably one which is charitable in nature as also so found by Justice Mustapha Hussain. He therefore found it unnecessary to rely on the expert evidence adduced by David Cheah Seng Chye.

[37] Moreover, Justice Ahmad Shahrir bin Mohd Salleh found and held that since there was no appeal against the decision of Justice Mustapha Hussain, Suit 1 is clearly a veiled attempt to re-litigate the same issue earlier raised and is as such barred by *res judicata*. He further found that the order made by Justice HS Ong expressly relates only to the will and codicil, but not the indenture which stood unaffected.

[38] As a result, Suit 1 was dismissed with RM150,000 costs to the first to fifth defendants therein subject to the allocator and RM50,000 to the sixth defendant therein subject to the allocator respectively.

[39] In consequence and as a matter of course, OS 2 and OS 3 were allowed by Justice Ahmad Shahrir bin Mohd Salleh.

Findings Of This Court

[40] Following the dismissal of Suit 1 and order in terms made for OS 2 and OS 3, David Cheah Seng Chye filed the appeals (which comprised aforementioned Appeal 159, Appeal 596 and Appeal 609) in respect of Suit 1, OS 2 and OS 3 respectively.

[41] All of the three appeals were heard together by us.

[42] At the hearing of the appeals, all the parties basically re-argued their contentions advanced below in the Penang High Court. David Cheah Seng Chye further focused on the contention that there is plainly no outright gift by the testator to charity but instead a gift for a specific purpose to be held on trust as expressed in the codicil. In other words, there is no general charitable intention contemplated by the testator; thus *cy-pres* could not be applied upon failure of the trust.

[43] We have therefore in the exercise of our appellate function reviewed Justice Ahmad Shahrir bin Salleh's ground of judgment in light of the contentions now advanced before us. It seems crucial that we must first determine the finding on *res judicata* as this will dictate whether it remains necessary thereafter to determine the remaining findings on the nature and consequences of the trust as bequeathed by the testator.

[44] The doctrine of *res judicata* in Malaysia is trite and explained in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189. In gist, Justice Peh Swee Chin held that its significance lies in its effect of creating an *estoppel per rem judicatum* which may take the form of either cause of action estoppel or issue estoppel. The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, that is the cause of action, merges into the said final judgment. The issue of estoppel, on the other hand, means simply an issue which a party is estopped from raising in a subsequent proceeding.

[45] However, the doctrine of *res judicata* is not confined to causes of action or issues which the court is actually asked to decide or has already decided. It covers also causes of action or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

[46] The resultant effect of the doctrine of *res judicata* has been set out in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 where Justice Mohd Azmi held as follows:

> *It is of course settled law as laid down by the Federal Court in Hock Hua Bank case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in Hock Hua Bank) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court "... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make. (emphasis added)

[47] In addition, Justice Peh Swee Chin in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* (*supra*) held as follows:

> When a judgment in High Court has been perfected in the manner described in the above passage, a party to the judgment generally and subject to the same passage, or any other written law, and apart from any appeal, cannot re-open the matter finalised in the judgment by seeking to alter it or amend it for the court would be *functus officio* by virtue of the ratio of *Hock Hua Bank v. Sahari Murid* [1980] 1 LNS 92. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior Court of unlimited civil jurisdiction in the course of contentious litigation, see *Issac v. Robertson* [1985] AC 97; *Pembinaan KSY Sdn. Bhd. v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 100. *Puah Bee Hong v. Pentadbir Tanah Daerah Wilayah Persekutuan* [1994] 2 MLJ 601. It is elementary that a superior court is not any inferior court or statutory tribunal, (such as a Land Administrator under the National Land Code as in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37). It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside or valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first.
>
> *When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action on any ground other than those mentioned in the quoted passage from Hock Hua Bank v. Sahari Murid [1980] 1 LNS 92* and as mentioned later in this judgment in connection with a consent judgment.
>
> ...
>
> *It is true that the Federal Court in Hock Hua Bank v. Sahari Murid [1980] 1 LNS 92 did say that a judgment could be set aside or impeached in a subsequent fresh action on the ground that such judgment was obtained eg, by fraud*. Would it follow that if fraud in obtaining a judgment is sufficient as a ground, a *fortiori*, illegality touching a judgment would also suffice similarly for setting it aside? My answer to this is negative. Now, the case of *Hock Hua Bank v. Sahari Murid* [1980] 1 LNS 92 does not mention such a ground of illegality. (emphasis added)

[48] Subsequently in *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673, Justice Abdull Hamid Embong held as follows:

> [31] It is settled law that the High Court cannot set aside a final judgment/order regularly obtained from another High Court unless the judgment was made in defiance of a substantive statutory prohibition which renders it null and void on the grounds of illegality or lack of jurisdiction. Only in that exceptional case can a defective judgment be struck out *ex debito justitiae*. It is thus only in this situation that a High

Court may exercise its inherent jurisdiction to strike out a regularly obtained judgment of another court of concurrent jurisdiction, (see: *Badiaddin*'s case)

...

[35] We are thus in agreement with the appellant's stand that an earlier judgment can only be impeached when it is prohibited by statute; and that Badiaddin to us merely reaffirmed that rule and does not extend the inherent jurisdiction of the court to correct a perfected order or judgment beyond any statutory prohibition. This established rule was explained in Tenaga Nasional which we had earlier adverted to. In our view; that part of the holding of the Court of Appeal in Selvam Holdings should not be interpreted as giving the courts a broad power to set aside a previous perfected orders under the guise of "exceptional cases". We think that the Badiaddin's phrase "to intervene and correct a serious defect in the order" should be read in the context of where an order was obtained in a manner which contravened a statute, resulting in that order being illegal or made outside the jurisdiction of the court. It is in this respect that the court's inherent jurisdiction may be exercised, to strike out an earlier order, ex debito justitiae and without the need for file a fresh suit.

[36] As regards the appellant's submission on the court being functus officio and that a fresh suit needs to be filed to strike out a previous regularly obtained order on the ground of fraud, we adopt the finding of this court in Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92; [1981] 1 MLJ 14 which we think has settled these issues. The headnotes from the report in that case, which need no further explanation, or expansion, is now reproduced as our answer to those related questions:

> In this case the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous orders. The learned judge thereupon set aside his order. The appellant appealed.

Held:

(1) the learned judge was *functus officio*;

(2) the court had no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing;

(3) *if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment*;

A (4) in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground fraud. (emphasis added)

[49] Based on the principles distilled from the abovementioned cases, we B are of the view that a plaintiff may only initiate a fresh action to impeach a regular judgment earlier obtained in the original action in limited categories of illegality, lack of jurisdiction or fraud.

[50] We are nonetheless mindful that in *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321 (which was affirmed in *Seruan Gemilang* C *Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1), Justice Gopal Sri Ram held as follows:

Now, *res judicata* is not merely a technical rule of pleading. It is a doctrine of substantial justice. It is a process whereby justice is achieved procedurally by precluding a party from re-agitating in subsequent D proceedings a complaint or an issue that has, or could fairly have, been disposed in earlier proceedings between the same parties or their privies. It is merely equity in action in the procedural arena. It is sometimes referred to as the rule in *Henderson v. Henderson* [1843] 67 ER 313. In that case, Wigram V-C said;

E In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of F litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

The plea of res judicata applies, except in special cases, not only to points upon which G *the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*

The doctrine may thus be seen to encompass several categories. In its narrowest sense, H *res judicata, I think, refers to estoppel by record. It refers to the actual decision the earlier action or proceeding. In its wider sense, it encompasses issues, and causes of action that could justly and fairly have been equally adjudicated in the earlier suit or proceeding. This wider operation of the doctrine is sometimes referred to "constructive res judicata". It houses the twin concepts of issue estoppel and cause of action estoppel. Like the tree of which they form the branches, they are designed* I *to ensure that there is finality in litigation.*

Pausing for a moment, I think that it is essential to bear in mind that Wigram V-C spoke these words in the Court of Chancery and that the court he referred to was that court, of which he was the Vice-Chancellor at the time. I make mention of these matters in order to demonstrate that the doctrine of *res judicata* has its roots in equity and hence retains its discretionary nature that is common to all equitable doctrines.

Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.

In *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 532, 573, Lord Upjohn said:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue.
>
> It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case ([1938] 4 All ER at p 755; [1939] AC at p 21)). All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

In *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93, 109, Lord Keith of Kinkel expressed the following view:

> In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. *One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result*, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss* case [1966] 2 All ER 536 at 573, [1967] 1 AC 853 at 947.

In a later passage, I find Lord Keith saying:

> Estoppel *per rem judicatam*, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process.
>
> In the present case I consider that abuse of process would be favoured rather than prevented by refusing the respondents permission to reopen the disputed issue. (emphasis added)

[51] After due consideration, we are of the view that special circumstances which exclude the application of *res judicata* or issue estoppel are only attracted upon the plaintiff demonstrating the threshold requirement of illegality, lack of jurisdiction or fraud which has occasioned in the original action. Nonetheless, the plaintiff may still be denied the opportunity to pursue the fresh action if special circumstances dictate that it is unjust for the plaintiff to do so. Put in another way, special circumstances do not create a new category warranting the pursuit of a fresh action but operate to deny the pursuit of the fresh action notwithstanding illegality, lack of jurisdiction or fraud has been made out. This is seen in *Chee Pok Choy* (*supra*) where the fresh action premised on fraud was allowed to proceed because it was found, on the facts and circumstances of the case, that it was unjust for the plaintiff therein to profit on the fraud it perpetrated on the court.

[52] Based on the facts here, it is plain that David Cheah Seng Chye neither pleaded illegality, lack of jurisdiction nor fraud to justify the institution of Suit 1. He also conceded there is no case authority that public charitable trust and/or private trust are a special category where the doctrine of *res judicata* ought not to apply.

[53] We are aware that David Cheah Seng Chye has relied on the earlier decision of Justice Azmi Arifin dated 27 April 2016 refusing to summarily strike out Suit 1 as sought by So Kiau Soo, Tai Chong, Tan Siew Joo, Lee Wally and Tan Chin Herng based on *res judicata* but we are of the view that, that is an interlocutory decision which is incapable and did not attract *res judicata* that binds Justice Ahmad Shahrir bin Salleh at the subsequent trial of the action.

[54] Consequently, we find that there is no misdirection by Justice Ahmad Shahrir bin Salleh who held Suit 1 is barred by *res judicata* by reason of Justice Mustapha Hussain's decision dated 2 September 1982. In this respect, we further find and hold that Justice Mustapha Hussain's decision that is evidenced by his grounds of judgment dated 20 August 1982 remains valid notwithstanding the fair order was never drawn up by either of the parties pursuant to O. 42 r. 10 of the Rules of the High Court 1980. As far as we are concerned, the decision of Justice Mustapha Hussain has been unmistakably made and that is all that matters here.

[55] We also concur with Justice Ahmad Shahrir bin Salleh that Justice HS Ong's order dated 29 March 1968 relates only to the will and codicil but not the indenture. Hence, the order only relates to the monetary gifts under the will and codicil. It did not affect the lands and pagoda as provided in the indenture. Consequently, the decision of Justice Mustapha Hussain stood unaffected because the court was neither *functus officio* nor acted in excess of jurisdiction at the material time and there is no further appeal against it.

[56] Our affirmation of Justice Ahmad Shahrir bin Salleh's finding on *res judicata* is adequate to dismiss all the three appeals of David Cheah Seng Chye before us. The OS 2 and OS 3 cannot be sustained when Suit 1 fails. Though strictly unnecessary but for completeness in the sake of public interest, we will deal with the parties' rival substantive contentions on whether the lands are subjected to a public charitable trust or private trust.

[57] Generally in *Ikumi Terada v. Jemix Co Ltd & Ors and Another Appeal* [2019] 1 LNS 881, Justice Kamaludin Md Said held as follows:

> [38] According to Halsbury's Malaysia para [310.043], *the law allows a declaration of trust of any property to be made informally and by parole*. There is no necessity for a declaration of trust to be made in writing, to be valid (*Teoh Heng Seng v. Teoh Kiew Seng* [2000] 1 CLJ 598; [2000] 1 MLJ 707). *In respect of the certainty of intention, there had to be clear evidence of an intention to create a trust and this could be inferred not only from the alleged settlor's words and conduct but also of the surrounding circumstances and the interpretation of any agreements that might have been entered into* (*Guy Neale v. Nine Squares Pty Ltd* [2014] SGCA 64). It is not necessary for a trust to be in writing (*Wan Naimah v. Wan Mohamad Nawawai* [1972] 1 LNS 164; [1974] 1 MLJ 41). Intention is a matter of evidence and it can be established by way of inference (*Emas Offshore v. Suhaimi Maryani* [2014] 10 CLJ 279). A person's intention for a trust is to be gathered from the totality of the particular circumstances of the case, including the words written or spoken and the conduct of the parties (*ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd* [2004] 4 CLJ 674). (emphasis added)

[58] We noted that in *Smith v. Hallum* 286 Ga 834, Justice Huntstein CJ held that the cardinal rule in construing a trust instrument is to discern the intent of the settlor and to effectuate that intent within the language used and within what the law will permit. Although the language of the trust will govern its construction, where an ambiguity exists, parol evidence may be considered.

[59] Thus, we are of the view that the true nature of the trust in question here will depend on the construction of the codicil and indenture contextually read against the backdrop of Chinese culture and custom; see *Hsu Yik Chai v. Hsu Yaw Tang & Anor* [1983] 1 CLJ 19; [1983] CLJ (Rep) 170; [1982] 2 MLJ 227.

[60] We have carefully read cls. 10(a) and 11(b)(i) of the codicil and cl. 1(a) to (c) of the indenture and find that the testator's dominant intention is to have the pagoda built as a Buddhist ancestral hall for the testator's family and descendants to worship ancestors as testified by the sole expert witness, Dr Tan Ai Boey in deciphering the name Liam (chant) Hood (Buddha/ Bodhisattva) Tong (hall) Chor Seng (ancestor) Thuan (altar). Liam Hood Tong Chor Seng Thuan strung together meant Buddhist ancestral hall/altar of worship.

[61] In addition, the testator having appointed his three sons (but not the executor) to implement his wishes under the indenture is consistent with Chinese culture and custom on building ancestral worship hall/altar wherein responsibility is vested only on male lineage with the same testator's surname. These are commonly done by wealthy Chinese families in China, Taiwan and Malaysia according to Dr Tan whom we are satisfied is an amply qualified expert on this matter based on her *curriculum vitae*.

[62] Be that as it may, we are mindful that there is also the intention of the testator to permit all persons who profess the Buddhist religion to worship and perform religious ceremonies in conformity with the Buddhist religion in the pagoda. We however find that this is the testator's servient intention subordinated to his dominant intention of building an ancestral worship half/alter particularly by him using the word "allow" in cl. 1(b) of the indenture.

[63] Consequently and since the testator's dominant intention is to have the pagoda built as an ancestral worship hall/altar, we find that the trust which has been created for this purpose does not constitute a public charitable trust following *Sir Han Hoe Lim v. Lim Kim Seng & Anor* [1956] 1 LNS 114; [1956] 22 MLJ 142 where Whitton J held as follows;

> *With regard to the ancestral house of worship it is clear this was a shrine for family purposes*, and I do not think its essential private nature is affected by the provision for the distribution of alms or food to poor travellers *or to other poor persons who might come to worship at the house* or live in the vicinity, for I feel this provision was contemplated by the Settlor primarily as affording financial assistance to an activity of good works in connection with the ancestral house and not as an assistance of a general nature to the alleviation of the condition of the poor of the neighbourhood or of impoverished itinerants passing through it. *If this view is correct not only is there an absence of a general charitable intention in respect of this trust, but in my opinion it has not that public element which a religious trust charitable in law must possess* (*Gilmour v. Coats & Ors* [1949] AC 426; [1949] 1 All ER 848). I have reached the conclusions, accordingly that the trust in respect of the school, though possessing no general charitable intention, is a valid charitable trust, *but that the trust in respect of the ancestral house of worship cannot be regarded as charitable, and is therefore, null and void.* (emphasis added)

[64] Moreover in *Re Syed Abdulrahman Shaikh Abdulrahman Alkaff, Deceased* [1953] 1 LNS 88; [1953] 1 MLJ 68, it was held that to be a charity in law, the trust must be established for purposes which are exclusively charitable; see also *Nai Seng Hiang & Ors v. The Trustees Of The Presbyterian Church In Singapore Registered & Ors* [1988] 1 LNS 98; [1988] 3 MLJ 311. We remain unconvinced that the testator had intended to establish a trust which was to be exclusively charitable.

[65] In the premises, we find and hold that there is no general charitable intention by the testator to divest the lands for purposes of religious charity generally. The trust which was created by the testator is therefore a private trust that is incapable of *cy-pres* upon failure of the trust contrary to that as found and held by Justice Ahmad Shahrir bin Salleh who concurred with Justice Mustapha Hussain.

[66] Thus, we agree with the interpretation that was advanced by the appellant before us. However, the appeals failed by reason as stated in para. 56 above.

Conclusion

[67] In the result, the appeals are dismissed with costs.